Supreme Court, U.S.
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No. 00-408

IN THE

Supreme Court of the United States

PHILIP CONDON FISHER,

Petitioner,

v.

UNITED FEATURE SYNDICATE INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

MARC D. FLINK
Counsel of Record
BAKER & HOSTETLER LLP
303 East 17th Avenue
Suite 1100
Denver, Colorado 80203
(303) 861-0600

Attorneys for United Feature Syndicate, Inc., E.W. Scripps Co., Charles M. Schulz Creative Associates, Denver Publishing Co., News America Publishing, Inc., Lee Mendelson, Bill Melendez, Arthur Barr Productions, Inc.; Capital Cities/ABC, Inc., Advance Publications, Inc., SI Holdings, Inc. and Kellogg Company

THOMAS B. KELLEY
FAEGRE & BENSON LLP
370 17th Street, Suite 2500
Denver, Colorado 80202-4004
(303) 592-9000

Attorneys for Walt Disney Co., CBS, Inc. and Turner Broadcasting Company

TODD P. BLAKELY
SHERIDAN ROSS, P.C.
1560 Broadway, Suite 1200
Denver, Colorado 80202-5141
(303) 863-9700

Attorneys for Thomson Consumer Electronics; General Electric Co.; Montgomery Ward & Company; Kacey Fine Furniture; Soundtrack; Fingerhut Corporation; and Best Buy Company

(Additional Counsel for Respondents listed on inside cover)

27pp

CHARLES F. LUCE, JR.
MOYE, GILES, O'KEEFE,
VERMEIRE & GORRELL LLP
29th Floor, 1225 17th Street
Denver, Colorado 80202-5529
(303) 292-2900

Attorneys for Metropolitan Life Insurance Co.

EILEEN R. LERMAN
LERMAN & ASSOCIATES, P.C.
50 South Steele Street, Suite 820
Denver, Colorado 80209
(303) 394-3900

Attorneys for DS-Max International, Inc. f/k/a Wholesale Warehousing International, Inc. f/k/a Murlar Wholesale Warehousing of Canada, Inc.

KENNETH B. SIEGEL
SHERMAN & HOWARD L.L.C.
633 17th Street, Suite 3000
Denver, Colorado 80202
(303) 297-2900

Attorneys for Mountain States Video, Inc. d/b/a TCI of Colorado, Inc.

SUANNE M. DELL
L. MICHAEL BROOKS, JR.
WELLS, ANDERSON & RACE LLC
1700 Broadway, Suite 1020
Denver, Colorado 80290
(303) 830-1212

Attorneys for Sears Roebuck & Company

QUESTIONS PRESENTED

I. Whether the Court of Appeals correctly applied the statute of limitations set forth in 17 U.S.C. § 507(b) relating to Universal Press Syndicate's 1993 comic strip "For Better or For Worse"?

II. Whether the Court of Appeals correctly applied the "abstraction-filtration-comparison" test in determining that there was no substantial similarity between the protectable elements of petitioner's works and the works of the respondents?

III. Whether the Court of Appeals properly dismissed petitioner's meritless claims without providing a jury trial?

IV. Whether petitioner's allegations of false copyright notices had any relevance to his claims?

V. Whether the Court of Appeals correctly concluded that petitioner's allegation of "purposely misspelled legal words" was not sufficient to sustain his copyright infringement claims?

PARTIES TO THE PROCEEDING

The respondents identified as parties in the Petition who join in this response are United Feature Syndicate, Inc.; Denver Publishing Company; E.W. Scripps Company; Charles Schulz Creative Associates; Lee Mendelson, Producer; Bill Melendez; Arthur Barr Productions Inc.; Wholesale Warehousing of Canada; CBS, Inc.; News America Publishing, Inc.; Kellogg Company; Metropolitan Life Insurance Company; Capital Cities/ABC, Inc.; TCI of Colorado, Inc.; General Electric Company; Turner Broadcasting System Inc.; Sears Roebuck and Co.; Montgomery Ward & Company; Kacey Fine Furniture; Soundtrack; Fingerhut Corporation; Best Buy Company; Walt Disney Company; Advance Publications Inc.; SI Holdings Inc.; and Thomson Consumer Electronics.

The respondents identified as parties in the Petition who have waived their response are Universal Press Syndicate, Inc. and Tyson Foods, Inc.

The respondents identified as parties in the Petition who were dismissed from this action before the Tenth Circuit Court of Appeals and were improperly included in the petitioner's list of respondents are King Features Syndicate, Inc., Cowles Syndicate, Inc., Kartes Video Communications and Cyclone Incorporated.

CORPORATE DISCLOSURE STATEMENTS PURSUANT TO SUPREME COURT RULE 29.6

E.W. Scripps Company is a publicly traded company and has no parent or publicly held company owning 10% or more of its stock.

United Feature Syndicate, Inc. is wholly owned by the E.W. Scripps Company, a publicly traded company.

Denver Publishing Company is wholly owned by the E.W. Scripps Company, a publicly traded company.

Capital Cities/ABC, Inc. n/k/a ABC, Inc. is an indirect subsidiary of the Walt Disney Company whose shares are publicly traded. Walt Disney is a publicly traded company and has no parent or publicly held company owning 10% or more of its stock.

Advance Publications, Inc. is privately held company and has no parent or publicly held company owning 10% or more of its stock.

General Electric Co. is a publicly traded corporation and has no parent or publicly held company owning 10% or more of its stock.

Thomson Consumer Electronics, Inc. is wholly owned by Thomson Multimedia S.A., a French company. Thomson Multimedia S.A. is publicly traded through American Depository Receipts. Thomson S.A., a non-publicly traded French company, owns more than 10% of Thomson Multimedia S.A.

RCA, formerly Radio Corporation of America, is no longer a legal entity. RCA brand products are distributed in the United States by Thomson Consumer Electronics, Inc.

Montgomery Ward & Co., Inc. filed for bankruptcy in July 1997. Its assets were ultimately transferred to Montgomery Ward, LLC. Montgomery Ward, LLC is solely owned by subsidiaries of General Electric Co., a publicly traded company.

Soundtrack is a d/b/a of Ultimate Electronics, Inc., which is a publicly traded company. Ultimate Electronics, Inc. has no parent or publicly held company owning 10% or more of its stock.

Kacey Fine Furniture is a d/b/a of Jack Barton & Company, Inc., which is a privately held corporation and has no parent or publicly held company owning 10% or more of its stock.

Fingerhut Corporation is wholly owned by Federated Department Stores, a publicly traded company. Federated Department Stores has no parent or publicly held company owning 10% or more of its stock.

Best Buy Co., Inc. is a publicly traded company and has no parent or publicly held company owning 10% or more of its stock.

Charles M. Schulz Creative Associates is a privately held company and has no parent or publicly held company owning 10% or more of its stock.

News America Publishing, Inc. was merged into News America Incorporated in 1999. News America Incorporated is a wholly owned subsidiary of the News Corporation Limited ("TNCL"), a publicly held corporation organized under the laws of the State of South Australia. TNCL's American Depository Receipts are traded on the New York Stock Exchange.

Arthur Barr Productions, Inc. is a privately held company and has no parent or publicly held company owning 10% of more of its stock.

SI Holdings, Inc. is the successor corporation to Scholastic Corporation. Scholastic Corporation is a publicly traded company and has no parent or publicly held company owning 10% of more of its stock.

Kellogg Company is a publicly traded company and has no parent or publicly held company owning 10% or more of its stock.

Sears Roebuck & Company is a publicly traded company and has no parent or publicly held company owning 10% or more of its stock.

Metropolitan Life Insurance Company is wholly owned by MetLife, Inc., a publicly traded company. MetLife, Inc. has no parent or publicly held company owning 10% or more of its stock.

DS-MAX International, Inc. f/k/a Wholesale Warehousing International, Inc. f/k/a Murlar Wholesale Warehousing of Canada, Inc. ("DS-MAX") is a privately held company. DS-MAX is owned 97.5% by Lawrence Tenebaum

Holdings Limited, a privately held company, with no parent or publicly held company owning 10% or more of its stock, and 2.5% by individuals.

Mountain States Video, Inc. d/b/a TCI of Colorado, Inc. is a wholly owned subsidiary of United Cable Television of Colorado, Inc. United Cable Television of Colorado, Inc. is a wholly owned subsidiary of United Cable Television Corporation. United Cable Television Corporation is a wholly owned subsidiary of United Artists Holdings, Inc. United Artists Holdings, Inc. is a wholly owned subsidiary of AT&T Broadband, LLC, in which AT&T CORP. is the sole member.

CBS, Incorporated is a wholly owned subsidiary of Viacom Incorporated, a publicly traded company.

Turner Broadcasting System, Inc. is a wholly owned subsidiary of Time Warner, Inc., a publicly traded company. Time Warner, Inc. has no parent or publicly held company owning 10% or more of its stock.

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Respondents respectfully submit that the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit should be denied.

OPINIONS BELOW

Philip Condon Fisher v. United Feature Syndicate, Inc., et al., Case No. 99-1162, United States Court of Appeals for the Tenth Circuit, reported at 2000 U.S. App. LEXIS 1749 (unpublished decision) (Petitioner's Appendix A); *Philip Condon Fisher v. United Feature Syndicate, Inc., et al.*, 37 F. Supp. 2d 1213 (D. Colo. 1999) (Petitioner's Appendix B), with attached Recommendation of United States Magistrate Judge (Petitioner's Supplemental Appendix).

STATEMENT OF THE CASE

I. NATURE OF THE CASE.

This is a *pro se* copyright infringement case. Petitioner, Philip Condon Fisher ("Mr. Fisher"), asserts that he owns virtually every idea ever expressed in certain unpublished comic strips created by him, including "Chipper" and "Langsyne," and that the use of similar ideas by other cartoonists in different comic strips constitutes copyright infringement. Mr. Fisher claims that his creation of a humanized "dog" named "Chipper," who Mr. Fisher describes as a cowardly Sherlock Holmes-type detective, legally precluded Charles Schulz from casting his comic character "Snoopy" in the role of a detective in the story "It's A Mystery Charlie Brown." Mr. Fisher claims that his copyrights were infringed when "Snoopy" assumed the role of a detective in 1974. "Snoopy" was created in 1950, over twenty years before "Chipper." A central part of "Snoopy's" established persona is his fantasy life. Long before "Chipper" was even a twinkling in my Fisher's eye, "Snoopy" had already portrayed

dozens of different characters, including a detective in 1962, a decade before "Chipper" was created.

The gross and absurd over breadth of the exclusive rights claimed by Mr. Fisher is perhaps best evidenced by his claims that Tyson Foods infringed his rights by producing a processed chicken food product called "Chick'n Chippers" and that RCA infringed his rights by naming its trademark puppy "Chipper."

As stated by the District Court, Mr. Fisher "would ask this Court to grant him a monopoly on unprotected elements, such as themes, emotions, and attitudes on which comic strips commonly rely." 37 F. Supp. 2d at 1220. The United States Magistrate Judge, the District Court and the Tenth Circuit Court of Appeals correctly determined that Mr. Fisher's claims were without merit. *See* Petitioner's Supplemental Appendix, Petitioner's Appendix A and Petitioner's Appendix B.

> This copyright action, as a whole, has been built up partly upon a wholly erroneous understanding of the extent of copyright protection; and partly upon that obsessive conviction, so frequent among authors and composers, that all similarities between their works and any others which appear later must inevitably be ascribed to plagiarism.

Perma Greetings v. Russ Berne & Co., 598 F. Supp. 445, 450 (E.D. Mo. 1984). This is an apt characterization of this case. *See* 37 F. Supp. 2d at 1220 ("[Mr. Fisher] fails to understand the fundamental differences between idea and expression.").

II. COURSE OF PROCEEDINGS.

On August 12, 1996, Mr. Fisher filed a "mostly unintelligible 128-page, 300-paragraph, 43-claim complaint against forty-one defendants." 2000 U.S. App. LEXIS 1749 at *5 n.1. The complaint sought damages in excess of $3 billion. *Id.* The plaintiff was Fisher Master Artists, Inc., a Colorado corporation ("FMA"). Filed with the complaint were two boxes of exhibits. The exhibits filed with the District Court were incorporated by reference in the complaint. The exhibits were not served on any of the respondents.

On August 15, 1996, Judge Zita L. Weinshienk ordered that the complaint would be dismissed if an attorney failed to enter an appearance on behalf of FMA.

On October 3, 1996, FMA filed a motion to amend the complaint to provide that Mr. Fisher, an individual, would be substituted as plaintiff in place of FMA. On October 28, 1996, the District Court granted the motion to amend.

On November 14, 1996, Mr. Fisher filed an amended complaint. The amended complaint incorporated by reference the exhibits previously filed with the Court. The exhibits were not served with the amended complaint.

On November 14, 1996, Mr. Fisher filed a motion seeking relief from the requirement that he serve on respondents copies of the exhibits filed with the District Court and incorporated by reference in the amended complaint. On December 30, 1996, Mr. Fisher filed further motions seeking relief from the requirement that he serve respondents with both the amended complaint and exhibits. By order dated January 3, 1997, the District Court denied Mr. Fisher's motion for relief from the requirement that he serve copies of the amended complaint with exhibits.

On January 6, 1997, defendant United Feature Syndicate, Inc. and other respondents filed a motion to quash service of process based on Mr. Fisher's failure to serve on respondents copies of the exhibits filed with the District Court and incorporated by reference in the amended complaint. The motion to quash was joined by numerous other respondents who never had been served with the exhibits filed with the District Court and referenced in the amended complaint.

On January 10, 1997, respondent Mountain States Video, Inc. d/b/a TCI of Colorado, Inc. filed a Motion to Dismiss or for Summary Judgment based in part on its status as a "passive carrier" of the allegedly infringing video of "It's a Mystery, Charlie Brown", pursuant to 17 U.S.C. § 111(a).

On January 22, 1997, a hearing was held before Magistrate Judge Abram. Magistrate Judge Abram reiterated and ordered that Mr. Fisher must supply a full set of the exhibits filed with the District Court and referenced in the amended complaint on each respondent by February 7, 1997 or service would be quashed.

On January 29, 1997, Mr. Fisher filed a Notice of Appeal. Mr. Fisher appealed from the District Court's interlocutory orders requiring him to serve on defendants copies of the exhibits filed with the District Court and referenced in the amended complaint. That appeal was dismissed for lack of jurisdiction.

On March 21, 1997, United Feature Syndicate, Inc. and related respondents filed a motion to dismiss Mr. Fisher's amended complaint. Respondent Universal Press Syndicate joined in the motion to dismiss. The motions to dismiss were joined by other defendants, including CBS, Inc., Turner Broadcasting System, and Walt Disney Company.

On March 26, 1997, Magistrate Judge Abram granted all pending motions to quash service of process for Mr. Fisher's failure to serve exhibits referenced in the amended complaint. Magistrate Judge Abram granted Mr. Fisher leave to file a second amended complaint.

At various times and against various defendants, Mr. Fisher filed motions styled as motions for summary judgment pursuant to Fed. R. Civ. P. 56.

On June 4, 1997, Magistrate Judge Donald Abram issued his Recommendation that the Mr. Fisher's amended complaint be dismissed, that the above-referenced motions for dismissal and summary judgment filed by defendants be granted, and that judgment be entered for the respondents. Magistrate Judge Abram's Recommendation is appended to the District Court's decision. 37 F. Supp. 2d at 1221-31.

On June 23, 1997, Mr. Fisher filed objections to the Magistrate's recommendations.

On March 4, 1999, The Honorable Wiley Y. Daniel issued a Final Judgment and Order adopting the Magistrate Judge's Recommendation. 37 F. Supp. 2d 1213. On March 5, 1999 and March 9, 1999, the Order and Judgment was amended in matters not material to this petition.

On April 5, 1999, Mr. Fisher filed a Notice of Appeal to the Tenth Circuit Court of Appeals.

On June 7, 1999, Mr. Fisher filed Appellant's Report Identifying Remaining Defendants/Appellees ("Appellant's Report"). Mr. Fisher stated in the Appellant's Report that "[t]he defendants previously dismissed by the plaintiff and now excluded and dismissed by the plaintiff/appellant, from this

appeal are as follows: (1) King Features Syndicate, Inc./Cowles Syndicate, Inc. . . . (14) Kartes Video Communications . . . (15) Importer, Cyclone, Inc. . . . ."

On February 7, 2000, the Tenth Circuit Court of Appeals affirmed the District Court's decision in an unpublished decision. 2000 U.S. App. LEXIS 1749. Pursuant to 10th Cir. R. 36.3, the unpublished judgment of the Tenth Circuit is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.

REASONS FOR DENYING THE WRIT

This writ should be denied for four principal reasons. First, the reasoning and judgment of the District Court and the Tenth Circuit Court of Appeals are sound and correct. Second, the unpublished decision issued by the Tenth Circuit Court of Appeals does not conflict with the decision of another United States Court of Appeals on the same matter. Third, the lower court's disposition of this *pro se* matter that was presented by "a mostly unintelligible 128-page, 300-paragraph, 43-claim complaint against forty-one defendants seeking over $3 billion in damages", after giving deference to the plaintiff's *pro se* status, was entirely appropriate and does not call for an exercise of this Court's supervisory power. Finally, the petition should not be granted to reevaluate the findings by the lower courts with respect to petitioner's copyright claims.

I. STATUTE OF LIMITATIONS.

This issue relates solely to Mr. Fisher's claim against respondent Universal Press Syndicate, Inc. Universal Press Syndicate, Inc. has waived its right to file a brief in opposition to the petition.

II. THE TEST FOR COPYRIGHT INFRINGEMENT WAS PROPERLY APPLIED.

The Tenth Circuit's decision was firmly grounded on the elements for copyright infringement enunciated by this Court in *Feist Pubs., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991):

> In order to prevail on [his] copyright infringement claim [p]laintiff must establish both: (1) that [he] possesses a valid copyright and (2) that [defendants] "copied" protectable elements of the copyrighted work.

Id. at 361.

The Tenth Circuit first focused on the allegations relating to whether respondents copied Mr. Fisher's comic strip. The Tenth Circuit next considered whether the alleged copied elements of Mr. Fisher's work, if any, were protectable under his copyright. Following a reasoned *de novo* analysis that need not be reviewed by this Court, the Tenth Circuit decided those issues in favor of the respondents.

The Tenth Circuit applied the "abstraction-filtration-comparison" test in making the determinations that defendants' works are not substantially similar to the protected elements of Mr. Fisher's work. In determining whether two works are substantially similar, the Tenth Circuit inquired "whether the accused work is so similar to the plaintiff's work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiffs' protectable [sic] expression by taking material of substance and value." 2000 U.S. App. LEXIS 1749 at *8, *citing to Country Kids 'N City Slicks, Inc. v. Sheen*, 77 F.3d 1280, 1288 (10th Cir. 1996), *quoting Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 614

(7th Cir. 1982). That inquiry led to the conclusion that there was no infringement.

As part of its findings of no substantial similarity between "Snoopy" and "Chipper," the Tenth Circuit found as follows:

> In affirming the magistrate judge's dismissal recommendation on this claim, the district court rejected Fisher's contention that because both "Snoopy" and "Chipper" were portrayed as "cowardly detective dog[s]," the two were "substantially similar." *Fisher*, 37 F.Supp.2d at 1218. The court concluded that Fisher relied exclusively on the cowardly detective dog similarity and did not satisfy the "abstraction-filtration-comparison" test under the reasonable observer standard. *See id.* at 1219. We agree.
>
> As defendants point out in their brief, "Snoopy" was on the scene in 1950, more than twenty years before Fisher copyrighted his "Chipper" character in 1974. *See* Appellees' Jt. Br. at 12. Defendants also noted that during those twenty years "Snoopy" was depicted in numerous roles, including a 1962 "Peanuts" episode submitted as an exhibit by Fisher depicting "Snoopy" dressed in a Sherlock Holmes hat and pipe. *See id.* at 12 n.5. Defendants also contend that while Fisher portrays "Chipper" as a "humanized" dog, *see id.* at 20, "Snoopy" is, and always has been, depicted as a dog, "Charlie Brown's" pet. *See id.* at 12. Fisher alleges that "Snoopy's" depiction as "cowardly" in "It's A Mystery, Charlie Brown," was a departure from his usual depiction as heroic, and was therefore,

> evidence of copying. Defendants' [sic] respond, and we agree that while the "Snoopy" detective character has been depicted as running away if startled, he has always been depicted as a character with "bravado" and has never been depicted as either particularly heroic or cowardly.
>
> * * *
>
> The idea of a detective dog is an element which is not included in copyright protection. *See* 17 U.S.C. §102(b). Moreover, an expression of that idea in a manner which is as common to the public domain as Sherlock Holmes falls under the *scenes a faire* doctrine, is not entitled to copyright protection and "cannot serve as the basis for ultimate liability for copyright infringement." *Gates Rubber Co.* 9 F.3d at 832 n. 7.

2000 U.S. App. LEXIS 1749 at *9-11.

The Tenth Circuit similarly made well reasoned determinations that Mr. Fisher's "Chipper" was not infringed by RCA's puppy "Chipper," Tyson Foods' "Chick'N Chippers" food product and UFS's "Drabble" comic strip. 2000 U.S. App. LEXIS at *14-16.

III. THERE IS NO RIGHT TO A JURY TRIAL ON MERITLESS CLAIMS.

It is well established that there is no Seventh Amendment right to a jury trial where there are no issues of fact to be tried by the jury. *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 467 (1962). Similarly, the right to a jury trial does not exist with respect to a complaint as to which a dismissal or nonsuit is proper.

Here, the Tenth Circuit properly stated and applied the correct standards for determining whether Mr. Fisher's *pro se* complaint sufficiently stated facts to survive a motion to dismiss:

> We review de novo the sufficiency of a complaint to survive a Fed.R.Civ.P. 12(b)(6) motion to dismiss for failure to state a claim for which relief may be granted. *See Bauchman ex rel. Bauchman v. West High Sch.*, 132 F.3d 542, 550 (10th Cir. 1997). Accepting any well-pleaded allegations of the complaint as true and construing them in the light most favorable to the plaintiff, the district court may appropriately dismiss a complaint only when it appears that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief. *See Yoder v. Honeywell, Inc.*, 104 F.3d 1215, 1224 (10th Cir. 1997). We construe Fisher's pro se pleadings liberally. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

2000 U.S. App. LEXIS 1749 at *6.

Under the facts as alleged in the amended complaint and the exhibits incorporated therein, it was clear to the Magistrate Judge, the District Court Judge, and the three judge panel of the Tenth Circuit that Mr. Fisher's "mostly unintelligible" amended complaint failed to state claims for relief upon which relief could be granted. Under such circumstances, where the facts taken as true do not give rise to a claim as a matter of law, there is no right to a jury trial. *See Christensen v. Ward*, 916 F.2d 1462, 1466 (10th Cir.), *cert. denied*, 498 U.S. 999 (1990); *see also* Fed. R. Civ. P. 12(b) and 56.

IV. PETITIONER'S ALLEGATIONS OF "FALSE COPYRIGHT NOTICES" ARE IRRELEVANT TO HIS CLAIMS FOR COPYRIGHT INFRINGEMENT.

This issue, apart from its being without factual or legal support, has no bearing upon whether Mr. Fisher's complaint stated a claim for copyright infringement. Petitioner asserts that "[t]he Tenth Circuit Court of Appeals erred in not prosecuting the defendants for their repeated publication of false copyright notices." Pet. at 14. Having no authority or jurisdiction to "prosecute" any of the respondents, the Tenth Circuit properly disregarded this argument in affirming dismissal of petitioner's copyright claims.

V. THE PRESENCE OF MISSPELLED WORDS DID NOT GIVE RISE TO A COPYRIGHT CLAIM.

The Tenth Circuit considered and properly rejected Mr. Fisher's allegations based on misspelled words:

> Likewise, Fisher's claim that the appearance of the misspellings of the legal terms "baratry" (barratry) and "repleven" (replevin), in the "It's a Mystery, Charlie Brown" book is prima facie evidence of infringement fails for the same reason. Fisher contends that these are copies of "clerical and typographical errors" proving piracy. Appellant's Br. at 6. If there was no other justification for the errors appearing in the book, they could, as Fisher contends suggest copying. *See Central Tele. Co. of Va. v. Johnson Pub. Co.*, 526 F. Supp. 838, 844 (D. Colo. 1981) (opining that the existence of common errors in two telephone directories was strong evidence of copying). As defendants argue, however, these errors appear to be in line with the

> comic strip characters' proclivity for misuse and mispronunciation of legal terms in the Charlie Brown strip. As such, they could be construed as an integral part of the humor or subject matter, a construction that would not give rise to a suggestion of copying. *See Gates Rubber Co.*, 9 F.3d at 838. Moreover, even if we were to consider the common errors to be some evidence of copying, this does not relieve Fisher of his burden of proving more substantial similarities between the works, a burden he did not meet. *See Country Kids 'N City Slicks, Inc.*, 77 F.3d at 1288.

2000 U.S. App. LEXIS 1749 at *12-13.

The Court of Appeals properly dismissed each of Mr. Fisher's claims.

CONCLUSION

This is yet another case where federal courts have gone to extraordinary lengths to give a *pro se* plaintiff who thoroughly misunderstands the law and has an unrealistic view of the "facts" his day in court. Mr. Fisher was given a fair opportunity to convince a Magistrate Judge, a District Court Judge, and the Tenth Circuit Court of Appeals that he had valid claims for copyright infringement. After a careful review of the allegations and legal theories, those tribunals determined that Mr. Fisher's "mostly unintelligible 128-page, 300-paragraph, 43-claim complaint against forty-one defendants" failed to state claims for relief upon which relief could be granted. The claims were properly dismissed pursuant to Fed. R. Civ. P. 12(b)(6). That dismissal properly was affirmed. Mr. Fisher's odyssey through the federal court system should end. Mr. Fisher's petition for writ of certiorari should be denied.

Respectfully submitted,

MARC D. FLINK
Counsel of Record
BAKER & HOSTETLER LLP
303 East 17th Avenue
Suite 1100
Denver, Colorado 80203
(303) 861-0600

Attorneys for United Feature Syndicate, Inc., E.W. Scripps Co., Charles M. Schulz Creative Associates, Denver Publishing Co., News America Publishing, Inc., Lee Mendelson, Bill Melendez, Arthur Barr Productions, Inc.; Capital Cities/ABC, Inc., Advance Publications, Inc., SI Holdings, Inc. and Kellogg Company

THOMAS B. KELLEY
FAEGRE & BENSON LLP
370 17th Street, Suite 2500
Denver, Colorado 80202-4004
(303) 592-9000

Attorneys for Walt Disney Co., CBS, Inc. and Turner Broadcasting Company

TODD P. BLAKELY
SHERIDAN ROSS, P.C.
1560 Broadway, Suite 1200
Denver, Colorado 80202-5141
(303) 863-9700

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CHARLES F. LUCE, JR.
MOYE, GILES, O'KEEFE,
VERMEIRE & GORRELL LLP
29th Floor, 1225 17th Street
Denver, Colorado 80202-5529
(303) 292-2900

Attorneys for Metropolitan Life Insurance Co.

EILEEN R. LERMAN
LERMAN & ASSOCIATES, P.C.
50 South Steele Street, Suite 820
Denver, Colorado 80209
(303) 394-3900

Attorneys for DS-Max International, Inc. f/k/a Wholesale Warehousing International, Inc. f/k/a Murlar Wholesale Warehousing of Canada, Inc.

KENNETH B. SIEGEL
SHERMAN & HOWARD L.L.C.
633 17th Street, Suite 3000
Denver, Colorado 80202
(303) 297-2900
Attorneys for Mountain States Video, Inc. d/b/a TCI of Colorado, Inc.

SUANNE M. DELL
L. MICHAEL BROOKS, JR.
WELLS, ANDERSON & RACE LLC
1700 Broadway, Suite 1020
Denver, Colorado 80290
(303) 830-1212
Attorneys for Sears Roebuck & Company